No. 80-1007

IN THE

Supreme Court of the United States

EDITH M. MARSCHAK, etc., *et al.*

Petitioner,

vs.

KIRKLAND and ELLIS, a Partnership, and
WESTINGHOUSE ELECTRIC CORPORATION,

Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Reply, in Support of the Petition for a Writ of Certiorari, is limited to providing essential omissions from the cases, and to correct factual misstatement, in the Westinghouse[1] Brief in Opposition.

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[1] As it did at each stage of the proceedings below, Kirkland and Ellis has adopted Westinghouse's Brief in this Court, Motion dated January 16, 1981.

I.A.

IN EACH CASE WESTINGHOUSE CITES, ANTAGONISM WAS FOUND ONLY WHERE THE SHAREHOLDER CHARGED MANAGEMENT WITH WRONGDOING

Westinghouse (Br. in Opp'n., Pt. 1A, p. 4) quotes general language from *Smith* v. *Sperling*, but fails to state that in *Smith*,[2] in *Swanson* v. *Traer*,[3] and in *Doctor* v. *Harrington*, 196 U.S. 579, 587-588 (1905), this Court found antagonism only where the shareholder charged corporate management with wrongdoing.

The rule under these cases is that only if wrongdoing is charged against management, then the corporation is not aligned as a party plaintiff.

I.B

ONLY WHERE THERE IS COLLUSION OR OTHER ARRANGEMENTS IN ALIGNMENT, DOES THE COURT GO BEYOND THE PLEADINGS

Westinghouse also fails to state that only where there is collusion in alignment of the parties, *Dawson* v. *Colombia Ave. Saving Fund*, 197 U.S. 178, 181-182 (1905) characterized by the Court as "pretense" and "device," or where the parties themselves have arranged their alignment for their own convenience, *Indianapolis* v. *Chase Nat'l. Bank*, 314 U.S. 63, 80-81 (1941)[4] is there any variance to the rule of *Smith* v. *Sperling*, that the determination of whether or there is antagonism between the shareholder and the corporation is to be made solely from the face of the pleadings, when filed.

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[2] 237 F.2d 317, 318.

[3] 230 F.2d 228, 229.

[4] *Venner* v. *Great Northern R. Co.*, 209 U.S. 24, 30-34 (1908) decided on these same grounds, cited in *Smith* v. *Sperling* at 95, explains the exception.

There Was No Antagonism on the Merits; Westinghouse Overlooks the Facts in the Record

After trying to get around the rule of *Smith* v. *Sperling* to make a claim that antagonism arose after the pleadings were filed,[5] Westinghouse misstates the record in seeking to support that claim. The Corporation was represented before the trial court on November 27, 1979, when its motion to dismiss was granted. Yet (Br. in Opp'n., p. 3, fn.; p. 4; p. 4, fn.) Westinghouse represents to this Court that its Special Investigation Committee opposed the suit on the merits before the dismissal.[6] In fact, except for the Corporation's procedural motions, for a stay of discovery and to dismiss for lack of jurisdiction, both Westinghouse and the Committee remained

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[5] Westinghouse does not dispute that in its response it was sympathetic to the shareholder's Rule 23.1 demand. Nor does it dispute that the filing of the response in an amendment to the complaint related back to the original time of the filing, under F.R.C.P. 15.

[6] The dismissal order was issued from the bench on November 27, 1979. *Tucker* v. *Nat'l. Linen Service,* 188 F.2d 502 (5th Cir. 1951) (Br. in opp'n., Pt. II, p. 6), and its earlier version, *Tucker* v. *New Orleans Laundry,* 503 F.2d 265 (5th Cir. 1951), was also a case charging wrongdoing by corporate directors, 90 F. Supp. 290, at 293; 92 F. Supp. 502 at 503-505. Also, as stated in *Doctor* v. *Harrington,* 196 U.S. 579, 586 (1905), a shareholder is presumed to be a citizen of the state in which the corporation was created, absent charges of wrongdoing, at p. 587.

The docket shows a minute order entered as of that date. (Westinghouse's Brief before the Court of Appeals, opposing emergency relief, dated December 13, 1979, pp. 5-6, are set out in full as an Appendix to the Reply.)

On November 29, 1979, when petition moved for reconsideration, counsel for Westinghouse represented that at that very moment, the Committee made its decision. Nothing was filed to show any basis for any such action by the Committee.

On December 7, 1979, the trial court issued written opinions, one on the dismissal, and the other on denial of reconsideration (App. to the Petition).

neutral on the merits. No citation is offered by Westinghouse to support a claim that these proceedings constitute the requisite antagonism. Petitioner, in the procedural steps below following the filing of the complaint, never charged wrongdoing by Westinghouse management.

Finally, Westinghouse concedes that Eckert, Seamans had a conflict of interest, and could not conduct the investigation of petitioner's demand—it would have been futile for petitioner to await action by that firm. Thus, the corporation confuses these facts with the futility found in cases such as *Smith* v. *Sperling* or *Swanson* v. *Traer*, where there are charges of wrongdoing by corporate management, and the facts in the present case, where there was no such charge.

Westinghouse's claim of antagonism is reduced to its charge that its failure to file this action is itself antagonism. But there is no substance to this claim. Westinghouse quotes from p. 447 of the opinion of the Second Circuit in *Lewis* v. *Odell*, 503 F.2d 445, but fails to include this language—which shows the conflict with the decision of the Seventh Circuit below:

> The nature of the dispute is such that none of the trustees [there the corporate management] will be harmed by a judgment for plaintiff or has any reason to oppose the suit. The pleadings do not disclose any antagonism. The [corporation] has not only retained neutrality in its responses to appellant's complaints but has even reserved the right to take control of the action. Indeed, the [corporation] has not even "refuse[d] to take action," for appellant has never made any demand on it. We could reverse the district court only by making the "mechanical determination" that as a matter of law a corporation is antagonistic to a shareholder's derivative suit whenever it does not actively join the action as a plaintiff. *Smith* and *Swanson* forbid such a holding.

CONCLUSION

The Court should order the judgment below reversed and provide that unless a shareholder in a derivative shareholders action charges wrongdoing by management, the corporation, for determination of diversity of jurisdiction, is to be realigned as a party plaintiff, and the citizenship of the shareholder who initiated the action, under these circumstances, is to be ignored.

Respectfully submitted,

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APPENDIX

On October 24, 1979, Westinghouse moved to dismiss plaintiff's complaint for lack of subject matter jurisdiction pursuant to Rule 12(b) (1) of the Federal Rules of Civil Procedure. Plaintiff countered by serving motion papers seeking to disqualify the Special Investigation Committee. A hearing was held on November 27 before Judge McGarr with respect to the pending motions, at which time he stated that he was granting the motion to dismiss. A minute order to that effect was entered that day which stated that a memorandum opinion and order would follow.

On November 28, 1979, plaintiff served motion papers requesting: (1) reconsideration of Judge McGarr's decision dismissing the action; (2) a stay, temporary restraining order, or preliminary injunction against issuance of the Committee's report pending appeal, pursuant to F.R.App.P. 8 (c); and (3) leave to send a notice to Westinghouse shareholders advising them of the dismissal and seeking to substitute a new plaintiff. The following day, November 29, plaintiff's

newest motion was presented to Judge Perry acting as emergency judge in place of Judge McGarr, and a briefing schedule was established.

Also, on November 29, 1979, the Committee met and concluded that the instant action should not be pursued further. That fact was reported to the district court at the November 29 hearing by counsel for Westinghouse, who stated:

> "It is my understanding — and I had to come in -- I was in fact cut short (in my telephone conversation) -- that the committee has now reached a decision that it does not want this action to continue."

The district court, on December 7, 1979, entered two memorandum opinions and orders. The first, a copy of which is attached as Exhibit C, granted the motion to dismiss. The second, a copy of which is attached as Exhibit D, denied the motion to reconsider and stated that since the Court did not have jurisdiction, it could not entertain the other requests for relief. Thus, the Court denied plaintiff's motion "in toto."